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BEFORE THE
SURFACE TRANSPORTATION BOARD

Oregon International Port of Coos Bay – Feeder Line Application – Coos Bay Line of the Central Oregon & Pacific Railroad, Inc.	)	Finance Docket No 35160

OPPOSITION OF CENTRAL OREGON & PACIFIC RAILROAD, INC. TO OREGON INTERNATIONAL PORT OF COOS BAY'S MOTION TO COMPEL DISCOVERY

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Dated: September 2, 2008

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The Central Oregon & Pacific Railroad, Inc. ("CORP") respectfully submits its opposition to the Oregon International Port of Coos Bay's ("Port") Motion to Compel Discovery ("Motion") pursuant to the Board's regulations at 49 C F R § 1114.31. Having already conducted two inspections of the portion of CORP's Coos Bay Subdivision (the "Line") that is the subject of the Port's Feeder Line Application ("Application") in this proceeding, the Port asks the Board to compel CORP to escort additional "experts" for the Port on yet another inspection of the Line Such a third inspection is unnecessarily duplicative and unduly burdensome. Indeed, the primary purpose for the Port's request appears to to establish a predicate for the Port to seek an extension of the September 12, 2008 due date for the filing of rebuttal evidence in support of its Application For the reasons set forth below, the Port's Motion should be denied.

I. BACKGROUND

The Port has had multiple opportunities to inspect the Line. Prior to filing its Application, Port witness Gene Davis inspected the the entire Line on April 14 - 16, 2008 *See* Application, V.S. Davis at 95-96 While the Port characterizes this inspection as a "limited physical inspection" that was "supplement[ed] with information provided through printed and verbal sources" (Application at 15), it was nevertheless sufficient to enable the Port to submit a

full and complete Feeder Line Application, which was accepted by the Director of Proceedings on July 31, 2008

Pursuant to the Port's First Set of Discovery Requests, the Port conducted a second three-day inspection of the Line from August 13-15, 2008 CORP agreed to the Port's request for an inspection, subject only to the requirements that (i) the Port's representatives be accompanied by a CORP employee during the inspection, and (ii) the Port execute an appropriate liability waiver and indemnity agreement ("Inspection Agreement"). Motion at 6 Upon receiving a positive response to the Port's inspection request, Port counsel requested that CORP's counsel "[p]lease provide a draft of a liability waiver and indemnity agreement that [the Port] may [then] review." *See* Motion, Exh. 4 (letter dated August 1, 2008 from D Benz to T. Hynes). Port counsel indicated that the Port "envision[ed] that three days will be needed to fully inspect the entire Line " *Id* Consistent with that representation, the draft Inspection Agreement prepared by CORP provided for a three-day inspection. *Id* § 2(a), Motion, Exh. 5 at 3. [1]

As the correspondence attached to the Port's Motion indicates, Port counsel subsequently requested that provisions of the draft Inspection Agreement limiting the inspection to three days, and prohibiting "testing" of soil, bridges, tunnels and track materials during the inspection, be removed. *See* Motion, Exh 6 at 3. Those changes were agreed to by CORP -- the Inspection Agreement, as executed by the parties, did not contain any limitation on either the duration of the inspection or the ability of the Port's representatives to inspect or to test bridges and tunnels

[1] The Port's resort to citing (and, in several instances, misrepresenting) the content of draft documents (such as the Inspection Agreement) and statements allegedly made by counsel during the course of discussions aimed at resolving discovery disputes is regrettable This tactic – which plainly has a chilling effect on the ability of counsel to speak frankly during the course of such discussions – is counterproductive and (contrary to the Port's assertions regarding CORPs' alleged "ill faith" actions) calls into questions the Port's own good faith in approaching discovery matters in this case.

along the Line. *See* Motion, Exh. 8 at 3. Pursuant to the Inspection Agreement, CORP provided a hi-rail vehicle and employee escort for the Port's representatives, who inspected the Line on August 13-15, 2008.

Contrary to the Port's assertions, CORP never "forbid" the Port's representatives access to the tunnels on the Line, nor did CORP ever say that "the tunnels would be off limits " Motion at 3, 4 The language of the Inspection Agreement makes clear that the Port's accusations in this regard are simply not true. As stated above, the only limitation in the initial draft of the Inspection Agreement was a prohibition on conducting "testing" in the tunnels, but that provision was deleted from the Inspection Agreement (at Port Counsel's request). Nor did CORP ever verbally or otherwise "forbid" entry into the tunnels on the Line. Indeed, the Port's Motion contradicts itself by acknowledging that "there never was a limitation in the CORP agreement limiting the Port's inspection of tunnels or bridge [sic] " Motion at 3 (emphasis added) During the discussions involving arrangements for the inspection, CORP counsel did caution that it might not be possible to gain access to all of the tunnels due to obstructions placed over the entrances by CORP for safety reasons However, as the Port's Motion indicates, CORP's employee unlocked the gates across tunnel entrances to permit passage during the inspection. Motion at 5, n.4.

The Port's further assertion that "CORP has not let the Port into three key tunnels [Tunnel Nos. 13, 15 and 18]" (Motion at 11) is, at best, disingenuous. As the Board knows, conditions in those three tunnels required CORP to impose an embargo for safety reasons last September. During the August 13-15 inspection, all participants in the inspection party (including the Port's representatives) sensibly agreed, in the interest of safety, not to enter those tunnels in the hi-rail vehicle. Any suggestion that CORP did not cooperate fully in making the

Line available to the Port's representatives during the August 13 -15 inspection is belied by the correspondence attached to the Port's Motion *See* Motion, Exh. 12 (following the inspection, Port's counsel advised that "CORP's personnel had been 'helpful' and 'cooperative' and that the Port's inspection party was able to cover the entirety of the subject lines during the inspection.")

In support of its Motion to compel a third inspection of the Line, the Port asserts that it now "has available up to eight additional tunnel, bridge and track inspectors" to conduct a further inspection of the Line Motion at 12-13. However, the Port does not offer any coherent explanation as to why none of these purported experts participated in the August 13-15 inspection. (The Port vaguely asserts only that "[s]cheduling and time constraints did not permit the Port to get bridge and tunnel experts on the ground" for that inspection. Motion at 4.) But it was the Port's responsibility to ensure that whatever experts it intended to rely upon participated in the inspection.[2] Moreover, any "time constraints" on the August 13-15 inspection were imposed by the Port—not CORP. In any event, the Port did not communicate any of these alleged problems to CORP before the August 13-15 inspection; if the Port had done so, the inspection could have been rescheduled for a time when the Port's experts could be available.

II. ARGUMENT

The Port bears the burden of proving that the Board should compel CORP to grant its discovery request *Allen v. Howmedica Leibinger, GmbH*, 190 F R D. 518, 522 (W.D. Tenn 1999) This burden should be considered in light of the fact that courts routinely deny duplicative discovery requests *See, e g., McConnell v. Pacificorp, Inc.*, 2008 WL 3843003, at *4 (N.D Cal. 2008); *Armstrong v. Siskiyou County Sheriff's Dep't*, 2008 WL 686888, at *11 (E.D Cal. 2008) In considering motions to compel discovery, the Board has said that it "will

[2] Instead of sending in experts, the Port chose to have James Bishop, the Port's Director, and Martin Callery, the Port's Director of Communications, join the inspection party

balance the burden and potential disruption that [the proponent's] proposal would impose on [the other party] with [the proponent's] need for the information and the possibility of obtaining it through other means." *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry. Co.*, STB Docket No. 42056, 2001 WL 112303, at *3 (Feb. 9, 2001), *see also Can. Pac. Ry. Co.—Control—Dakota, Minn. & E. R.R. Corp.*, STB Fin. Docket 35081, 2008 WL 820744, at *6 (March 27, 2008) ("The scope of the request would clearly constitute a burden . . . We must balance that burden against the facts that the information is not relevant to the particular foreclosure theories advanced.")

The Board has also expressed a general policy disfavoring discovery in abandonment proceedings. *E. St. Louis Junct. Ry.—Adverse Abandonment—In St. Clair County*, STB Docket No. AB-838, 2003 WL 21501894, at *4 n.11 (June 30, 2003), *Cent. R.R. Co. of Ind.—Abandonment Exemption—In Dearborn, Decatur, Franklin, Ripley, And Shelby Counties, IN ("CIND")*, STB Docket No. AB-459 (Sub-No. 2X), 1998 WL 148638, at *3 (April 1, 1998) The Board has said that this is "due not only to the strict time constraints" in abandonment proceedings, but because only rarely is discovery justified in this type of proceeding. *CIND*, 1998 WL 148638, at *3.

While the Board's Feeder Line regulations do permit discovery, the regulations make clear that the purpose of such discovery is to enable the applicant to obtain information required to prepare a "complete" application 49 C.F.R. § 1151.2. In the instant case, the Port filed a complete Feeder Line Application on July 11, 2008, and that Application was accepted by the Board on August 1, 2008 Under the regulations, the Application must contain the Port's entire case in chief, 49 C.F.R § 1151.2; accordingly, the Port had no need for further discovery Nevertheless, CORP responded to the Port's First Set of Discovery Requests, including its

request for a second inspection of the Line. Given the highly abbreviated procedural schedule established by the Board in this case, the Port's burden to show good cause for granting a motion to compel should be even higher than usual.

Moreover, "[o]nce an objection to the relevance of the information sought is raised, the burden shifts to the party seeking the information to demonstrate that the requests are relevant to the subject matter involved in the pending action " *Allen v. Howmedica Leibinger, GmhH*, 190 F R.D. 518, 522 (W.D. Tenn. 1999). A party seeking to compel discovery must "show clearly that the information sought is relevant and would lead to admissible evidence." *Export Worldwide, Ltd v Knight*, 241 F.R D. 259, 263 (W.D. Tex. 2006); *Alexander v FBI*, 186 F R D 154, 159 (D D.C 1999) ("[T]he proponent of a motion to compel discovery bears the initial burden of proving that the information sought is relevant ") In considering a motion to compel, the Board has recognized that information is only relevant for discovery purposes when the specific information sought is necessary for the Board's determination in the litigation. *Canadian Nat'l Ry Co & Grand Trunk Corp Control—EJ&E West Co.*, STB Fin Docket No. 35087 (Feb. 22, 2008), *Salt Lake City Corp —Adverse Abandonment—In Salt Lake City, UT*, STB Docket No. AB-33 (Sub-No 183), 2002 WL 27988, at *1 (Jan. 11, 2002)

A. The Port's Motion Should Be Denied Because The Port's Request Is Duplicative, Unduly Burdensome And Not Likely To Lead To Discovery Of Relevant Information.

The Port's Motion should be denied in its entirety because the Port's request for a third inspection of the Line is (1) "unreasonably duplicative," (2) the Port has already had ample opportunity to inspect the Line, and (3) the burden of providing another hi-rail inspection outweighs any benefit, especially since the condition of the tunnels is not relevant to any issue properly before the Board in this Feeder Line proceeding

The Port's Motion quotes a variety of cases discussing the scope of discovery generally under the Federal Rules of Civil Procedure. Motion at 8-11. Conspicuously absent from that discussion, however, is any mention of the fundamental rule that "it has long been recognized that burden and repetition are grounds for limiting discovery." 8 Wright, Miller, & Marcus, *Fed Prac. & Proc. Civ.2d* § 2008.1 (1994). Under Federal Rule of Civil Procedure 26(b)(2)(C):

> the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> > (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive,
> >
> > (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
> >
> > (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues

F R.C.P. 26(b)(2)(C)(emphasis added) The Port's Motion presents the rare case in which all of these reasons apply

First, the Port's request for yet another entry on to the Line is unreasonably duplicative and cumulative. *See* Fed R Civ. P. 26(b)(2)(C)(i) The Port admits that it has already inspected the Line twice, the second time accompanied by CORP personnel in CORP's hi-rail vehicle. Motion. at 4. The August 13-15 inspection party traversed the entire length of the Line and was provided access to bridges and tunnels, as well as the track No limitation was placed upon the duration of that inspection, and the Port's representatives could have extended the inspection for one or more days if they had desired to do so It is unreasonable for the Port to insist on yet another escorted multi-day excursion over the Line, particularly considering the accelerated procedural schedule in this proceeding

Second, the information the Port seeks by inspection can be obtained from a more convenient source. *See* Fed. R. Civ. P. 26(b)(2)(C)(i). When the requested discovery is burdensome, it is appropriate to deny that discovery when the information sought is available from other sources. *See, e g , Allen v Howmedica Leibinger, GmbH*, 190 F R D 518, 525 (W.D Tenn. 1999) (denying discovery of information that is "publicly available from sources that are more convenient, less burdensome, or less expensive") The Port has in its possession at least four tunnel inspection reports: (1) the 1994 Shannon & Wilson report, (2) the 2004 Milborn Pita report, (3) the 2007 Shannon & Wilson report, and (4) the 2007 FRA report All of these reports examined the condition of the tunnels on the Line extensively, and can provide the Port with the information that it seeks. In addition, the Port's Motion states that its battery of new tunnel, bridge and track inspectors "are already familiar with the Line" and that "[t]hese inspectors have available to them prior data on the Line" as well as "discovery materials on the condition of the Line (especially bridges and tunnels) that CORP produced in response to other Port discovery requests." Motion at 12-13 and n 10 Given the extensive data already available to the Port regarding the bridges and tunnels on the Line, the Port cannot meet its burden of showing that a new inspection is needed

Third, the Port has had ample opportunity to inspect the Line. *See* Fed. R Civ P 26(b)(2)(C)(ii) It is uncontested that CORP has provided the Port with an escort and a hi-rail vehicle for the Port inspection team to examine the entire line At the Port's request, CORP removed any time limitation from the inspection, and CORP employees were available to escort the Port inspection team beyond the three days actually utilized by the Port inspection team The Port now claims to have squandered that opportunity, by not having experts with the "time" or

"ability" to evaluate bridges and tunnels participate in the August 13-15 inspection. Motion at 4. 5 n 4.

The Port has no excuse for not bringing the experts it now claims must inspect bridges and tunnels on the Line on its August 13-15 inspection. The Port's inspection team consisted of Jeffrey Bishop, the Port's Executive Director,[3] Martin Callery, the Port's Director of Communications,[4] and Gene Davis, the lone expert, whose expertise the Port now claims does not extend to bridges and tunnels (Motion at 4-5 and n 4) – even though it is Mr. Davis who sponsored the Port's testimony regarding the alleged cost of removing the Umpqua and Siuslaw River bridges *See* Davis V S., Application Ex. 6. While the Port now claims to have retained "up to eight additional tunnel, bridge and track inspectors" (Motion at 12-13 and n 10), the Port does not offer any legitimate reason why none of those new experts accompanied the prior inspection team, nor does the Port explain why the inspectors' familiarity with the Line is not sufficient for them to advise the Port.

The Port has not cited any case in which a second entry on land was compelled after the requesting party had a full and ample opportunity to inspect the property. Indeed, by requesting

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[3] According to Mr. Bishop's biography, he "

> received a Bachelor of Arts degree from Central State University (now the University of Central Oklahoma) and did graduate work in Public Administration at the University of Oklahoma Bishop holds the Certified Commercial Investment Member (CCIM) designation from the CCIM Institute, an affiliate of the National Association of Realtors®, and the Real Property Administrator (RPA) and Facility Management Administrator (FMA) designations from the Building Owners and Managers Institute (BOMI).

http //www portofcoosbay com/bishopbio htm

[4] According to Mr. Callery's biography, he "has a Bachelor of Arts in Journalism/Mass Communications from the University of Texas at El Paso, and has completed Master's level course work in Marketing Management." http://www portofcoosbay.com/martin htm.

yet another inspection without showing good cause why the Port did not ensure that it had experts with "time and ability" to inspect the tunnels and the bridges for the August 13-15 inspection, the Port shows that it approached the prior inspection as "nothing more than a tourist expedition." *See Phila Belt Line R R Co v Consol. Rail Corp.*, STB Fin Docket No. 32802, 1996 WL 88980, at *2 (March 1, 1996)

Fourth, the burden of providing yet another escorted multi-day inspection of the entire Line outweighs any benefit that such an inspection might have in this proceeding *See* Fed. R. Civ. P. 26(b)(2)(C)(iii). Entry upon land is considerably more burdensome than other methods of discovery. Federal courts and commentators have noted that "[i]t is clear that the right to discovery is a qualified right that does not extend to making unnecessary and unwarranted excursions onto the property of another under the guise of supportable litigative need." *Belcher v Basset Furniture Indus , Inc.*, 588 F 2d 904, 908 n.12 (4th Cir 1978) (quoting 8 Wright & Miller, *Fed Prac. & Proc.* § 2040, at 286-287 (1970)) "Since entry upon a party's premises may entail greater burdens and risks than mere production of documents, a greater inquiry into the necessity for inspection would seem warranted " *Belcher*, 588 F.2d at 908, *DUSA Pharma , Inc. v. New England Compounding Pharma , Inc* , 232 F R.D. 153, 154 (D Mass 2005). In view of the burden to CORP in providing another multi-day escorted excursion, and the irrelevance of the current condition of the tunnels to this proceeding, it is clear that the Port's repetitive and burdensome request should not be granted.

The burden on CORP is substantial In the first guided inspection, CORP provided the Port with a hi-rail vehicle and knowledgeable escorts for multiple days This is a significant burden for a short line railroad with a small staff like CORP CORP's staff is responsible for operating and maintaining more than 300 miles of CORP track that is not subject to the embargo,

in addition to providing customer service to CORP shippers on those lines. Moreover, CORP's staff are needed to assist in preparing CORP's rebuttal evidence in the abandonment proceeding (STB Docket No. AB-515 (Sub-No. 2X)), which is due on September 12, 2008.

At the same time, any benefits to be gained by yet another inspection appear to be limited. The Port offers two reasons why (according to it) a third inspection of the Line is necessary.

The Port argues that it "cannot prudently move forward with an acquisition of the Line without first inspecting and analyzing the condition of the central infrastructure." Motion at 11. The Port has already testified under oath in this proceeding that there is no viable alternative to its Feeder Line Application– the Port must purchase the Line. August 21 Hearing Tr. 137 (Bishop). Indeed, Port Director Bishop asserted that the Port is ready to spend its "last dime" to acquire and rehabilitate the Line. Bishop Suppl. V.S. at 10. These sworn statements belie the notion that a further inspection of the Line is necessary to enable the Port to decide whether to proceed with a purchase of the Line.

The Port also argues that the inspection is needed because "the conditions of the tunnels and bridges on the Line have a direct bearing on the NLV of the Line." Motion at 11. This argument has no merit. The current condition of bridges and tunnels on the Line is not relevant to the Board's determination of Net Liquidation Value, which must necessarily be based upon the assumption that rail operations would cease and the Line would be liquidated. Moreover, the Port has already filed extensive evidence on the NLV issue, including its claim regarding the alleged removal costs of the Umpqua and Siuslaw Bridges. As even the Port's filings show, other bridges would not be removed, and tunnels would be closed. In *Salt Lake City Corp — Adverse Abandonment—In Salt Lake City, UT*, STB Docket No. AB-33 (Sub-No. 183), 2002 WL

27988, at *1 (Jan. 11, 2002), in similar circumstances, the Board denied a motion to compel filed by applicant because the application had already been filed and by regulation, no new evidence was allowed The Board in that case stated:

> The City has already filed its application, which, according to our regulations, must contain its entire case in support of abandonment of the rail line At this stage of the proceeding, any further filing by the City may only be in response to UP's protest, it may not contain any new or additional evidence in support of the application. Moreover, discovery is not necessary for the City to respond to the protest."

Id Just like the City in that case, the Port has already filed its Feeder Line Application, which was required to contain the Port's "entire case." Any rebuttal evidence that the Port may properly file on September 12, 2008 must be limited to responding to the evidence that CORP itself filed on August 29, 2008 in response to the Application CORP's August 29 filing does not raise any issues with respect to the current condition of bridges and tunnels on the Line

B. The Board Should Not Grant The Port's Request For An Extension To File Its Rebuttal Evidence.

The Federal Rules Advisory Committee has stated that "the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues " Notes of the Advisory Committee on the Federal Rules (Rule 26(b), 1983 Amendment). Not only does the Port's Motion ask the Board to compel a duplicative and unnecessary third inspection of the Line, it requests that the Board "modify the procedural schedule" to permit the Port to "supplement the record" on October 10, 2008. Motion at 13. According to the Port, if such an extension is granted, it would defer addressing in its September 12 rebuttal evidence "the current condition of the tunnels and bridges or anything else that arises from the inspection " Motion at 13 (emphasis added). As these statements show, the Port's

Motion for a further inspection is nothing more than a transparent attempt to obtain an unjustified extension of time to file its rebuttal evidence.

There is no justification for granting the the Port until October 10 to file any part of its rebuttal evidence. It would be especially inappropriate to give the Port more time to prepare rebuttal evidence addressing the NLV of the Line – one of the issues with respect to which the Port has stated it requires an additional inspection (*see* Motion at 11) – because the Port has, in effect, already given itself an extension of time to file such evidence. As the Board is now aware, the Port failed to submit any evidence on the NLV issue in its August 28, 2008 response to CORP's Abandonment Application. Instead, the Port apparently intends to file that evidence as "rebuttal" in connection with its Feeder Line Application on September 12, 2008. The obvious intent (and effect) of this "sandbag" tactic on the Port's part is to deny CORP any opportunity to rebut evidence regarding the NLV of the Line that the Port should have submitted as part of its opposition to the Abandonment Aplication on August 28, 2008.

The Board should not countenance such an abuse of its procedures. The Board should not give the Port a further extension until October 10 to file any part of its rebuttal evidence in the Feeder Line proceeding. Moreover, because the Port chose to withhold any response to CORP's NLV evidence in the abandonment proceeding from its August 28 reply filing, the Board should not entertain any argument by the Port that its rebuttal evidence in the Feeder Line case can be used to refute CORP's NLV evidence in the abandonment case. Rather, the Board should set the NLV for the lines involved in the abandonment proceeding based on CORP's uncontested evidence filed in that docket.

III. CONCLUSION

For the foregoing reasons, the Port's Motion to Compel and for extension of time should be denied in its entirety

Respectfully submitted,

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Dated: September 2, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Opposition of Central Oregon & Pacific Railroad, Inc. to Oregon International Port of Coos Bay's Motion to Compel Discovery to be served, this 2nd day of September 2008, by email on

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and copies to be served by first-class mail, postage prepaid, to all parties of record.

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